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Nos. 00-596, 00-597

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In The

Supreme Court of the United States

Lorillard Tobacco Co., et al.,
Petitioners,
v.
Thomas F. Reilly, Attorney General of Massachusetts,
Respondent.

Altadis U.S.A., Inc., et al.,
Petitioners,
v.
Thomas F. Reilly, Attorney General of Massachusetts,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, ALASKA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, DISTRICT OF COLUMBIA, FLORIDA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MARYLAND, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH DAKOTA, NORTHERN MARIANA ISLANDS, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA AND WISCONSIN IN SUPPORT OF RESPONDENT

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INTRODUCTION AND INTEREST OF AMICI

It is of utmost importance to the States that they be able to regulate the location of tobacco advertising in order to curb the illegal use of tobacco by minors. Numerous States and local jurisdictions have enacted laws and regulations which restrict where tobacco advertising may be displayed. For example, California prohibits outdoor billboards within 1000 feet of schools or public playgrounds. Cal. Bus. & Prof. Code § 22961 (2001). Utah has banned virtually all outdoor advertising of tobacco products for 80 years. Utah Code Ann. § 76-10-102 (2000). Texas bans tobacco advertising within 1000 feet of both churches and schools, Tex. Health & Safety Code § 161.122 (2000), while Kentucky bans tobacco billboards larger than 50 square feet within 500 feet of schools, Ky. Rev. Stat. Ann. § 438.047 (2000). Arizona prohibits advertisements on school buses for any substance that is "illegal for minors such as alcohol, tobacco, and drugs or gambling." Ariz. Rev. Stat. § 15-342.27(a) (2000).

Additionally, amici States' strong interest in imposing location-based restrictions on tobacco advertising is evident in the non-economic provisions of the Master Settlement Agreement (MSA) entered into in November 1998 by the major tobacco companies and nearly all the States and Territories.[1] *See, e.g.*, MSA § III(c), prohibiting tobacco brand sponsorships of sporting events and concerts where youth are likely to be present; § III(d), banning billboards and most other outdoor advertising of tobacco products; § III(e), prohibiting tobacco companies from paying for the use or display of tobacco products in motion pictures, television shows, theater productions, live music, commercial film or video, and video games; § III(f), prohibiting ads for tobacco products on apparel

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[1] The MSA is available at http://www.naag.org/tobaccopublic.

and merchandise; and § III(g), prohibiting distribution of tobacco product samples except in adult-only facilities.

SUMMARY OF ARGUMENT

Petitioners maintain that the Federal Cigarette Labeling and Advertising Act of 1969, 15 U.S.C. §§ 1331-1340 ("FCLAA"), preempts Massachusetts' regulations restricting the location of tobacco advertisements in proximity to schools and playgrounds. They are wrong. The FCLAA narrowly preempts state regulation of tobacco advertising only if it interferes with the uniform federal health warnings on cigarette packages and in advertisements. *See Cipollone v. Liggett*, 505 U.S. 504, 516 (1991). Congress has expressed no "clear and manifest purpose" to preempt restrictions on the location, as contrasted with the content or message, of tobacco advertising. *Id.* The subject of the Massachusetts regulations falls within the traditional police powers of the States to enact zoning restrictions which further the purpose of enforcing longstanding laws that criminalize the sale of tobacco to minors, thereby protecting children from the consequences of their own immaturity. Simply put, the Massachusetts regulations are not preempted because they are not restrictions "with respect to the advertising or promotion" of appropriately labeled cigarettes "based on smoking and health" within the meaning of Section 5 of the FCLAA, 15 U.S.C. § 1334. Specifying where tobacco products may not be advertised does not interfere with the purpose of the FCLAA to establish uniformity in a health warning system for packaging and advertising of cigarettes.

Petitioners also contend the Massachusetts regulations violate their First Amendment right to freedom of speech. The tobacco advertisements at issue are a species of unadorned commercial speech. The constitutional validity of the Commonwealth's regulation of these advertisements is therefore subject to analysis under the "intermediate" scrutiny standard for commercial speech

articulated in *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980). Massachusetts' limited regulations meet that standard: they stem illegal sales activity and further the state's substantial interest in curbing underage tobacco usage, and they do so by means reasonably adapted to that end.

Petitioners have invited the Court to depart from the *Central Hudson* analysis and instead to subject Massachusetts' regulations to the heightened, indeed withering, standard of strict scrutiny – the standard applied to regulation of the most cherished forms of political, philosophical, artistic, and scientific speech. Petitioners appear interested in exploiting the discomfort that some members of the Court have expressed in situations where government has restricted the dissemination to *adults* of truthful, nonmisleading speech involving *lawful* activity in an attempt to keep adults ignorant of facts that might influence their choices in the marketplace. This case, however, presents none of those concerns. Massachusetts' regulations reduce *children's* exposure to the advertising of tobacco products, in a State where the sale of these products has been *illegal* for more than a century. In such a context, *Central Hudson* continues to provide a viable framework for the analysis of restrictions on commercial speech.

Adopting Petitioners' position would severely impede the States' traditional police powers and would hamper efforts to prevent the illegal use of tobacco "particularly among children and adolescents, [which] poses the single most significant threat to public health in the United States." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000).

ARGUMENT

I.

MASSACHUSETTS' REGULATIONS ARE NOT PREEMPTED BY THE FCLAA

Massachusetts regulates the location of tobacco advertising in a manner that does not infringe on the federal requirements for advertising and promotion of cigarettes. Because "the Supremacy Clause '[s]tarts with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress,' " *Cipollone*, 505 U.S. at 516 (citation omitted), Massachusetts' regulations are presumptively permitted, not preempted.

In the FCLAA Congress specified that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes" labeled in conformity with the Act. 15 U.S.C. § 1334(b) (2000). The scope of the statute's preemptive force rests on an interpretation of two phrases: "with respect to advertising and promotion of cigarettes" and "based on smoking and health." In light of the presumption against the preemption of State police power regulations, both of these phrases must be construed narrowly. *Cipollone*, 505 U.S. at 519 and 523.

A. Massachusetts' Rules Do Not Regulate "With Respect To Advertising Or Promotion Of Cigarettes" Within The Meaning Of The FCLAA

In section 2 of the FCLAA, Congress declared its purpose:

> [T]o establish a comprehensive Federal program to deal with cigarette labeling and advertising with respect to any relationship between smoking and health, whereby –

> (1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and in each advertisement of cigarettes; and
> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to any relationship between smoking and health.

15 U.S.C. § 1331 (2000).

Thus, Congress reserved the health content of cigarette labeling and advertising for federal regulation in order to avoid the confusion and effect on commerce that would result from differing warning notices and health messages on cigarette packages or advertisements. A State may restrict the location of tobacco advertising without interfering with this congressional design.

Applying established principles of construction, the Second, Fourth, and Seventh Circuit Courts of Appeals – in addition to the First Circuit below – have concluded that location restrictions on tobacco advertising are not pre-empted by § 1334(b). *See Greater New York Metro. Food Council, Inc. v. Giuliani* ("*Giuliani*"), 195 F.3d 100 (2d Cir. 1999); *Federation of Advertising Indus. Representatives, Inc. v. City of Chicago* ("*FAIR*"), 189 F.3d 633 (7th Cir. 1999); *Penn Advertising of Baltimore, Inc. v. Mayor of Baltimore*, 63 F.3d 1318 (4th Cir. 1995), *vacated on other grounds*, 518 U.S. 1030 (1996), *remanded and readopted*, 101 F.3d 332 (1996), *cert. denied*, 520 U.S. 1204 (1997).

Both *Giuliani* and *FAIR* note that the legislative history of 15 U.S.C. § 1334(b) characterizes the preemption section as "narrowly phrased" and expressly intended to preserve the remainder of the States' traditional police powers. *Giuliani*, 195 F.3d at 110; *FAIR*, 189 F.3d at 638.

These two decisions also note that over 30 years before the FCLAA was adopted, the Court held, in *Packer Corp. v. Utah*, 285 U.S. 105, 108-110 (1932), that a statewide ban on tobacco display advertising, including billboards, was a matter of traditional local control and within the State's police powers. 195 F.3d at 109; 189 F.3d at 639. *Giuliani* observed that location restrictions do not lead to the type of "diverse, nonuniform, and confusing" advertising standards Congress sought to avoid, especially in light of the fact that "[d]ivergent local zoning restrictions on the location of sign advertising are a commonplace feature of the national landscape and cigarette advertisers have always been bound to observe them." 195 F.3d at 109. *See also* 189 F.3d at 639; *Penn Advertising*, 63 F.3d at 1324.

The only contrary holding among the circuit courts of appeals on the question of FCLAA preemption of state restrictions on the location of tobacco advertising is *Lindsey v. Tacoma-Pierce County Health Department*, 195 F.3d 1065 (9th Cir. 1999). But *Lindsey* followed neither *Cipollone's* mandate to give Section 1334(b) a "fair but narrow reading," 505 U.S. at 524, nor *Medtronic's* principle that interpretation of a federal preemption statute "does not occur in a contextual vacuum." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). *Lindsey* read the *Cipollone* plurality opinion as "expressly recogniz[ing] that the plain language of the FCLAA is determinative to resolving preemption issues regarding tobacco advertising." *Lindsey*, 195 F.3d at 1071. Although the court in *Lindsey* "recognize[d] that there is some ambiguity in the FCLAA's legislative history," it discounted this legislative history because "the structure and history of the FCLAA do not unambiguously support" narrow preemption. *Id.* at 1073. The Court has made clear that appropriate weight must be given to the interpretive rules designed to protect state and local regulatory authority from

mistakenly broad preemption that Congress did not intend. These rules, rooted in concerns of federalism, are designed to avoid turning generalities into unintended and invasive displacement of a state's police powers. *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 655 (1995) (cautioning against constructions that would "read the presumption against preemption out of the law whenever Congress speaks to the matter with generality").

Several courts have recognized the absurd results of applying the kind of broad preemption urged by Petitioners. In *Mangini v. R.J. Reynolds Tobacco Co.*, 7 Cal.4th 1057 (1994), Reynolds argued that if cigarettes were labeled in conformity with federal law, California could not impose regulations with respect to advertising if the regulations were based on underlying health concerns. This would necessarily include any requirement or prohibition with respect to advertisements of cigarettes that target minors:

> Reynolds contends, in effect, that if it had used billboards depicting Old Joe Camel stating in huge block letters, 'Kids, be the first in your fourth grade class cool enough to smoke Camels'; or, to use the example of the Court of Appeal, 'if Reynolds had . . . presented Teenage Mutant Ninja Turtles on children's lunch boxes to promote cigarette smoking,' California could do nothing about it, for any attempt to do so would be a requirement or prohibition 'based on smoking and health.' Only the federal government, Reynolds claims, can prevent advertisements that urge minors to smoke, no matter how blatantly.

Id. at 1067. Similarly, in *FAIR* the court of appeals observed that a broad reading of the preemptive scope of the FCLAA could lead to results Congress never could have intended, such as the conclusion that "states [are]

without power to prohibit a cigarette company from handing out free cigarettes in an elementary school yard." 189 F.3d at 638.

Proper application of the principles in *Cipollone* and subsequent decisions of the Court demonstrates that the FCLAA does not preempt the States' exercise of their historic police powers to regulate the location of advertising. Congress's evident, and limited, purpose was to spare the tobacco companies from having to change the content of their health warnings from one jurisdiction to another. Certainly it cannot be said that superseding the States' traditional police powers, such as the power to adopt zoning ordinances and measures to safeguard children, was the "clear and manifest purpose of Congress." *Cipollone*, 505 U.S. at 516.

B. Massachusetts' Regulations Are Not "Based On Smoking And Health" Within The Meaning Of The FCLAA

Even if Massachusetts were regulating "with respect to advertising or promotion of cigarettes" – which it is not – its regulations would be preempted only if they were also "based on smoking and health." 15 U.S.C. § 1334(b). Although the precise meaning of this phrase is not self-evident, the FCLAA as a whole, and the Act's legislative history, make clear that Congress intended to give it narrow effect as well. As the Court has previously recognized, under the FCLAA,

> pre-emption of regulation or prohibition with respect to cigarette advertising is *narrowly phrased to preempt only State action based on smoking and health*. It would in no way affect the power of any State . . . with respect to the taxation or the sale of cigarettes to minors, or the prohibition of smoking in public buildings, or *similar police regulations*. S. Rep. No. 91-566, p. 12 (1969).

Cipollone, 505 U.S. at 529 n.26 (plurality opinion) (emphasis in original). "This indicates that Congress intended the phrase 'relating to smoking and health' . . . to be construed narrowly." *Id.* at 529.

In *Cipollone*, a smoker who had contracted lung cancer asserted state common law claims that the defendants had caused her illness by misrepresenting and concealing the health consequences of smoking. *Id.* at 518. Under a broad reading of the FCLAA, the claims would have been preempted, since the fraud claims purported to regulate the health-related content of cigarette advertising. But the Court found the claims averted preemption because they were "predicated not on a duty 'based on smoking and health' but rather on a more general obligation – the duty not to deceive." *Id.* at 528-29. *Cipollone* thereby established the limited preemptive reach of the FCLLA's "based on smoking and health" provision.

The statute's language underscores its confined scope. So much attention has been focused on the words "smoking" and "health" that an equally, or perhaps more, significant word in the phrase is rarely thoughtfully considered. To be subject to preemption, a regulation must be "based" on smoking and health. "Base" is defined as "that on which something rests or stands"; "the fundamental part of something"; the "basis." Webster's Third New Int'l Dictionary (1976). It is, therefore, the *purpose* of the regulation that should be examined rather than any potential ancillary "health" advantage that may be obtained by the restriction. Certainly no legislator could be unaware of the health risks attendant to the use of cigarettes and other tobacco products, but the fact that health benefits accrue from advertising restrictions should not skew the analysis of the purpose of the enactment.

It is evident that States and local jurisdictions may choose to act to further their system of laws and to safeguard their minor citizens. Governments have long endeavored to shield minors from the consequences of their own immature judgment and from those who would seek to exploit it. That policy far predates concern about the scientific relationship between smoking and health. Moreover, it supports legislation across a wide spectrum of issues, ranging from age of consent to alcohol to driving requirements. Undoubtedly, many of these laws have public health consequences, but no one would suggest that the statutes are "based on" public health concerns. Their focus, instead, is child welfare and is rooted in the realm of public "morals."

As the California Supreme Court explained in examining the FCLAA's effect,

> [a]lthough the Legislature has certainly spoken about the dangers of smoking, we do not rely on those provisions in finding no preemption, but on Penal Code section 308, which prohibits the sale of cigarettes to minors. The original version of that statute . . . was enacted over a century ago. This was long before current health concerns, and specifically the health concerns that fuel this lawsuit, arose. The statute is part of a chapter of the Penal Code containing offenses "against good morals." Several of these offenses involve minors. (Pen. Code, § 307 [illegal to sell food items containing alcohol to those under the age of 21 years], 309 [illegal to admit a minor to a house of prostitution], 310 [illegal for a minor to attend a prizefight or cockfight].) This shows that the state's protective role, and not primarily health concerns, motivated the prohibition against selling cigarettes to minors.

Mangini, 7 Cal.4th at 1069 (citations omitted). Like California, Massachusetts has sought to prevent underage use of tobacco for more than a century. *See* Mass. Gen. Laws, ch. 270, § 6 (2000).

The Commonwealth's stated basis for its restrictions on tobacco advertising is "to eliminate deception and unfairness in the way cigarettes and smokeless tobacco products are marketed, sold and distributed in Massachusetts in order to address the incidence of cigarette smoking and smokeless tobacco use by children under legal age." 940 Code Mass. Reg. § 21.01 (2001). Many other jurisdictions have enacted restrictions on the advertising of tobacco products "based" on factors other than "smoking and health." For instance, California's legislation, prohibiting outdoor billboards within 1000 feet of schools or public playgrounds, was expressly designed "as a means to curb the illegal use of tobacco by minors." Cal. Bus. & Prof. Code § 22961; Cal. Stats., ch. 219, § 1(f) (1997). Utah adopted its virtually total ban on outdoor advertising of tobacco products in 1921, Utah Code Ann. § 76-10-102, which this Court squarely upheld in *Packer Corp. v. Utah*, 285 U.S. 105 (1932). Texas's statute bars tobacco advertising within 1000 feet of both churches and schools, a restriction manifestly based on "moral" considerations rather than concerns about the health of churchgoers and school children. Tex. Health & Safety Code § 161.122. Arizona's ban on the advertising of tobacco products on school buses prohibits advertisements for any substance that is "illegal for minors such as alcohol, tobacco, and drugs or gambling" and requires that all advertisements comply with the "state sex education policy of abstinence." Ariz. Rev. Stat. § 15-342.27(a). Like other States, Arizona has grouped tobacco use with a range of activities from which governments typically seek

to shield children, not all of which have a direct negative impact on health.[2]

State and local regulation which does not interfere with the aim of Congress in the FCLAA to promote uniformity in health warnings on packages and in advertisements is not preempted by the Act. As in the case of fraud claims examined in *Cipollone*, there is no evidence that Congress viewed the regulatory scheme of the FCLAA as being aimed at the problem of underage smoking.[3] Given the judicially recognized inability of minors to analyze and appreciate the content of warning labels, *see Anheuser-Busch v. Schmoke*, 101 F.3d 325, 329 (4th Cir. 1996), construing the FCLAA narrowly, so as not to preempt regulations such as those adopted by Massachusetts, is appropriate.

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[2] Not all "health" concerns are related directly to the consequences of the use of tobacco itself. Baltimore's tobacco advertising ordinance, for example, seeks to protect minors from addiction to "harder" drugs. The City Council noted that "cigarettes constitute a 'gateway drug' for Maryland students, as they are often the first drug used by adolescents and 'appear to "open the door" for use of other harder drugs at a later date.' " *Penn Advertising*, 63 F.3d at 1321. Although the Council's concern ultimately relates to health, it is surely not the health issues associated with smoking referred to by Congress in the FCLAA.

[3] Justice Blackmun's opinion in *Cipollone* contains a valuable observation: the FCLAA is unlike other federal statutes where Congress has "eased the bite of pre-emption" by establishing a "comprehensive civil enforcement scheme." *Cipollone*, 505 U.S. at 541-42 (Blackmun, J., concurring in part and dissenting in part). Surely, Congress did not intend to take away a State's ability to protect its youth without providing an alternate framework.

Congress used the phrase "based on smoking and health" for a reason. The phrase means nothing if no matter what government says is its rationale, any law directed toward regulating tobacco advertising is assumed to be based on health considerations and pre-empted. On the contrary, it is reasonable to presume that jurisdictions are exercising their traditional police powers to protect minors when advertising restrictions single out areas frequented by children. Reading the FCLAA as treating all government regulation of advertising and promotion of cigarettes as nonetheless, "based on smoking and health" disregards the genuine and compelling moral objective of state and local lawmakers to protect children from the consequences of their own immaturity.

II.

MASSACHUSETTS' REGULATIONS DO NOT VIOLATE THE FIRST AMENDMENT

A. The Regulations Withstand Scrutiny Under *Central Hudson*

The *Central Hudson* inquiry provides a comprehensive means of evaluating the restrictions at issue. The regulations survive that analysis for at least two distinct reasons. First, commercial speech "at least must concern lawful activity and not be misleading" to come under the aegis of the First Amendment. *Central Hudson*, 447 U.S. at 566. But these regulations concern, indeed explicitly target, an *unlawful* activity: the sale of tobacco to minors. They therefore fall beyond the First Amendment's scope. Second, even if the transactions advertised here are deemed lawful for purposes of *Central Hudson*'s threshold inquiry, the regulations still comply with the remainder of the *Central Hudson* analysis. They serve a "substantial" governmental interest. They "directly advanc[e]" that

interest. And they are "not more extensive than is necessary to serve that interest." *Id.* (quoted in *Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173, 183 (1999)).

1. The Restrictions May Be Upheld As Targeting Speech That Proposes An Illegal Transaction

The government may restrict, or ban entirely, "speech proposing an illegal transaction." *Village of Hoffman Estates v. Flipside* ("*Flipside*"), 455 U.S. 489, 496 (1982); *see Pittsburgh Press Co. v. Pittsburgh Comm'n On Human Relations*, 413 U.S. 376 (1973). No constitutional objection may be raised to the suppression of commercial messages that inform the public about opportunities to engage in unlawful activity.

Massachusetts, like every other State in the Union, outlaws tobacco sales to minors. *See* Donald W. Garner & Richard J. Whitney, *Protecting Children From Joe Camel and His Friends*, 46 Emory L.J. 479, 498 n.103 (1997). With respect to children, tobacco billboards and in-store advertisements in Massachusetts therefore propose an illegal transaction. Accordingly, such advertising may be restricted. *See Central Hudson*, 447 U.S. at 566 n.9 (speech "related to unlawful activity" may be prohibited); *Mangini*, 7 Cal.4th at 1069 ("Advertising aimed at such unlawful conduct [i.e., tobacco sales to minors] would assist vendors in violating the law").

That the advertisements at issue also promote lawful sales to adults does not change the analysis. The Court has held that speech regarding different types of transactions, only some of which were illegal, should be considered "speech proposing an illegal transaction." *See Flipside*, 455 U.S. at 496. The *Flipside* opinion examined an ordinance that regulated, *inter alia*, commercial speech

regarding "items that have some lawful as well as unlawful uses." *Id.* at 497 n.9. The Court determined that, because "the ordinance [was] expressly directed at commercial activity promoting or encouraging illegal drug use," any commercial speech involved was related to an unlawful activity, and could therefore be "regulate[d] or ban[ned] entirely." *Id.* at 496. It was ultimately of no consequence that the ordinance prohibited speech about products that had legal uses in addition to their employment with illicit drugs.

With respect to tobacco advertising, Massachusetts has passed regulations "expressly directed" at the unlawful use of "items that have some lawful as well as unlawful uses." *Flipside* teaches that the regulations should be upheld on the basis of *Central Hudson*'s first prong.

The Court need not, however, decide that the regulations require no further First Amendment analysis in order to sustain them. The restrictions also survive review under the remaining prongs of the *Central Hudson* test. *Cf. United States v. Edge Broadcasting*, 509 U.S. 418, 425 (1993) (declining to address question of applicability of more lenient standard because the statutes at issue were "not unconstitutional under the standards of *Central Hudson*"). The fact that the commercial speech addressed by the regulations is in substantial part speech that relates to an unlawful activity strongly supports a decision upholding the restrictions under the remainder of the *Central Hudson* analysis.

2. Massachusetts' Regulations Effectively Address A Genuine Harm

The Commonwealth's restriction on tobacco advertising "directly and materially advances" its "asserted interest" in reducing children's use of tobacco and so satisfies the third prong of *Central Hudson*. *Greater New Orleans*

Broadcasting, 527 U.S. at 188. That is, "the harms [Massachusetts] recites are real" and the regulations "will in fact alleviate them to a material degree." *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). The means chosen to advance the governmental policy goal "need not be perfect, but simply reasonable." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 509 (1981).

The Court's opinions do not require that a State establish with scientific certainty that its program will succeed. "[W]e do not read our case law to require that empirical data come to us accompanied by a surfeit of background information." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995). Yet just such a surfeit of information is present in this case.

Extensive evidence demonstrates that advertising, and particularly tobacco advertising, increases demand for the product advertised among minors. *See, e.g.*, Garner & Whitney, at 532-42 and n.317 (collecting studies); U.S. Department of Health and Human Services, *Reducing Tobacco Use, A Report of the Surgeon General* (2000) (concluding that "regulation of the sale and promotion of tobacco products is needed to protect young people from smoking initiation" and that "the major barrier to more rapid reductions in tobacco use is the effort of the tobacco industry to promote the use of tobacco products").

The Court has never held that the evidence a State proffers in support of a restriction on commercial speech must be uncontested. Rather, if the government has reasonably relied on studies and other evidence tending to establish the efficacy of its chosen course, then it has satisfied the dictates of *Central Hudson*'s third prong. *See Florida Bar*, 515 U.S. at 628. What the government must avoid are "mere speculation and conjecture," *Edenfield*, 507 U.S. at 770, and "unsupported assertions," *Ibanez v. Florida Bd. of Accountancy*, 512 U.S. 136, 143 (1995).

As a practical matter, it is only where the government has offered no evidence, or solely evidence that contradicts the regulation's stated purpose, that the Court has found *Central Hudson*'s requirements unmet. *See, e.g., Ibanez*, 512 U.S. at 148 ("We have never sustained restrictions on constitutionally protected speech based on a record so bare as the one on which the Board relies here"); *Edenfield*, 507 U.S. at 772 (striking regulation where evidence in record "contradicts, rather than strengthens" the proffered purpose). On the other hand, where the State has offered ample evidence, both empirical and anecdotal, the Court has found the third of *Central Hudson*'s criteria satisfied. *See, e.g., Florida Bar*, 515 U.S. at 627 (upholding regulation supported by record "noteworthy for its breadth and detail").

The studies and other evidence referenced in the Massachusetts "Attorney General's Statement of Material Facts" submitted to the District Court (*see* Joint Appendix at 102) belong in the latter category. Indeed, the Attorney General's submissions in this case appear to exceed in their depth and breadth any such factual submissions described in the Court's prior commercial speech cases. If the Court has never sustained a restriction on commercial speech on the basis of "a record so bare" as that in *Ibanez*, it has also never struck down regulations that rest on a record so replete as that now before it.

The ample record provided by Massachusetts underscores another aspect of the regulations that distinguishes them from restrictions the Court has disapproved in the past: there is no serious dispute that Massachusetts' stated interest in preventing youth smoking is in fact the motivating force behind the regulations. The amount of evidence adduced is, of course, one indication of the nexus between the stated and actual purposes of the government's regulation. In cases where the Court has

suspected a lack of correspondence between the Government's proffered interest and its actual interest, the restrictions at issue have been struck down. *See, e.g., Edenfield*, 507 U.S. at 768 ("Neither will we turn away if it appears that the stated interests are not the actual interests served by the restriction"); 44 *Liquormart v. Rhode Island*, 517 U.S. 484, 503 (1996) (plurality opinion) (questioning restrictions that "serve only to obscure an 'underlying governmental policy' that could be implemented without regulating speech") (quoting *Central Hudson*, 447 U.S. at 566 n.9); 517 U.S. at 531 (O'Connor, J., concurring in the judgment) (observing that Court has taken a "closer look" because "we declin[e] to accept at face value the proffered justification for the State's regulation").

Most frequently in these cases, the Court has determined that the government's unspoken motivation was to accomplish economic protectionism through the regulation of speech. *See, e.g.*, Garner & Whitney, at 491 (law in *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), "shielded pharmacists from the rigors of free enterprise"). A second such motivation, though it has not always been concealed, has been the forbidden criterion of the "offensiveness" of the speech involved. *See, e.g., Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 (1983); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 (1977). Neither of these impermissible motivations infects the regulations at issue here.

Accordingly, the regulations satisfy the third test of *Central Hudson*.

3. The Restrictions Provide The Requisite Fit Between The Government's Means And Ends

Government regulations must, in order to comport with the First Amendment, represent "a fit that is . . . reasonable" between the State's ends and the means it has selected to achieve them. *Board of Trustees v. Fox* ("*Fox*"), 492 U.S. 469, 480 (1989). In order that "the Legislative and Executive Branches" may be accorded "needed leeway," *id.* at 481, the particular regulation need not represent the "single best disposition," *id.* at 480, or the "least restrictive means" of limiting the commercial speech at issue, *id.* at 480, 481. Rather, the scope of the regulations must be "in proportion to the interest served."[4] *Id.* at 480.

In the particular context of commercial speech, the Court has established that the government has greater

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[4] Accordingly, Massachusetts need not criminalize the purchase of tobacco by minors, or require licenses of retailers who sell tobacco, or adopt any other single measure that Petitioners may point to as extant in another State. *See* Pet. Br. at 25 n.4. A State is not required to exhaust every possible non-speech remedy before employing a limited speech-based restriction. If the reverse were true, a State would have no way to know when it had done enough. Would it be sufficient to exact fines from underage tobacco users, or would the Commonwealth need to legislate prison terms as well before it could begin to address the advertising that stoked the minors' demand? *Cf. Fox*, 492 U.S. at 481 (noting "the difficulty of establishing with precision the point at which restrictions become more extensive than their objective requires"). It is crucial to view Massachusetts' regulations *in context*, as part of a longstanding, extensive effort to prevent underage tobacco use, of which recently enacted restrictions on commercial speech are but a part. The regulations are "narrowly tailored to achieve the desired objective." *Id.* at 480. They need not be more: "Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed." *Id.*

freedom to regulate when it does so with respect to consumers who – like children – are particularly vulnerable to such speech. *See Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 465 (1978) (focusing concern on "unsophisticated, injured, or distressed" consumers and granting State greater leeway to protect those "more vulnerable to influence"). The level of "sophistication of [the advertiser's] audience," and the "undue influence" that may be brought to bear on the unsophisticated, have remained foci of the Court's concern. *See Bates v. State Bar of Arizona*, 433 U.S. 350, 366, 384 n.37 (1977). Recently, for example, the Court has allowed restriction of attorneys' commercial speech in the solicitation of vulnerable clients "only days after accidents," *see Florida Bar*, 515 U.S. at 631, but barred such restriction of an accountant's direct approach to "sophisticated and experienced business executives," *see Edenfield*, 507 U.S. at 775. With respect to the pervasive enticements of present-day advertising, children can be considered *per se* a vulnerable population. That status is heightened in the case of tobacco advertising, where the consequences of children's being influenced by the companies' marketing are so severe – initiating a dangerous, highly addictive behavior – that the permissible "scope" of regulation "in proportion to the interest served" must necessarily be enhanced. *See Fox*, 492 U.S. at 480.

In evaluating the reasonableness of the "fit" in this case, the Court's decision in *United States v. Edge Broadcasting* ("*Edge*"), 509 U.S. 418 (1993), is particularly instructive. The Court there upheld a ban on North Carolina broadcasters' advertising of a Virginia lottery because the ban supported North Carolina's policy prohibiting in-state lotteries. *Id.* at 428, 434. The advertising ban was permissible even though the actual lottery advertised was "a legal activity," *id.* at 426, both as to

Virginians and as to North Carolinians who might cross the border to participate. *See Bigelow v. Virginia*, 421 U.S. 809, 822-24 (1975). Here, by contrast, the particular transaction advertised – the sale of tobacco products – is *illegal* as to at least a significant part of the audience receiving the speech. The fundamental government "objective" here is significantly greater than the purpose the Court found sufficient in *Edge*.

Furthermore, the "cost" imposed by the advertising ban in *Edge* was notably larger, and the benefit appreciably smaller, than in the present case. *See Fox*, 492 U.S. at 480. In *Edge*, the fact that the vast majority of the potential audience for the broadcast – more than 92% – lived in Virginia and were therefore not the intended "beneficiaries" of the government's speech regulation did not change the outcome, because the regulation did benefit the in-state portion of the audience (approximately 8%) which it was intended to benefit. 509 U.S. at 429. Here, the population Massachusetts aims to protect is, in percentage terms, likely more than three times as great.[5]

In addition, although these children may encounter tobacco ads in other places and in other media such as newspapers or magazines, the fact that they will be freed from exposure for at least part of the time represents a cognizable benefit. In *Edge*, the restrictions "exclud[ed] invitations to gamble from 11% of the radio listening time" of the North Carolina residents who could be

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[5] Approximately 22.5% of the Massachusetts population is under age 18. *See Age Distribution: Massachusetts Cities and Towns*, 1990 Census of Population and Housing, Report #91-9 (6/12/91), *available at* http://www.umass.edu/miser/dataop/data.htm. Minors may be presumed to be present in at least somewhat greater concentrations in the particular areas targeted by the regulations, i.e., in the vicinity of schools and playgrounds.

reached by the Edge station's broadcasts. *Id.* at 432. That benefit was explicitly held to provide more than "ineffective," "remote," "conditional," or "limited incremental support" to the government's purpose and, therefore, to pass muster under *Central Hudson*. *Id.* A plurality of Justices additionally considered the cumulative impact of the advertising restriction statewide; however, Justice Souter, joined by Justice Kennedy, briefly concurred to note that "the restriction at issue here [was] constitutional" even as applied to the Edge station alone. *Id.* at 436 (Souter, J., concurring). Massachusetts' restrictions on tobacco advertising, which are similarly partial, confer at least as great a benefit. *Cf. id.* at 434 ("Congress has, for example, altogether banned the broadcast advertising of cigarettes, even though it could hardly have believed that this regulation would keep the public wholly ignorant of the availability of cigarettes").

The regulations at issue may readily be distinguished from the type of commercial speech restrictions that the Court has invalidated. For example, the Court has voided regulations restricting speech about constitutionally protected commercial activity. *See, e.g., Carey*, 431 U.S. at 700-01 (contraception); *Bigelow*, 421 U.S. at 822-23, 827-28 (abortion services). But in no case has the Court invalidated restrictions on commercial speech that – like those here – were enacted in furtherance of, and actually advanced the purpose of, a prohibition on commercial activity that could legitimately be banned.[6] *See, e.g., Fipside*, 455 U.S. at 496.

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[6] The requirement that the underlying commercial activity be unlawful avoids the *44 Liquormart* plurality's expressed concern that a lesser standard – for example, a condition that the activity merely be designated a "vice" – would open the floodgates to suppression of protected speech. 517 U.S. at 514. Indeed, the "illegality" requirement comports precisely with the

The Court has also disapproved of situations in which an ambivalent government is left to defend the irrational remains of an ill-conceived or half-abandoned scheme. *See Greater New Orleans Broadcasting*, 527 U.S. at 190 ("regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it"); *44 Liquormart*, 517 U.S. at 503 n.13 and 506 (any connection between speech restriction and asserted goal would be "purely fortuitous"); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488 (1995) (noting "overall irrationality of the Government's regulatory scheme"). In *Greater New Orleans Broadcasting*, the federal government's "ban" on advertising of casino gambling was so riddled with exceptions and contradictions that the regulatory scheme was "decidedly equivocal." 527 U.S. at 187. The underlying "illegal" activity – gambling – was, in effect, no longer unlawful. Here, by contrast, Massachusetts' plan for preventing underage smoking is thorough and unequivocal; the State's policies have been uniformly aimed at preventing youth smoking, not promoting it. Finally, this is not a case in which the government has acted only on a "recently developed concern." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993). Tobacco sales to minors have been illegal in Massachusetts since 1886. *See* Mass. Gen. Laws, ch. 270, § 6 (2000).

Massachusetts has adopted restrictions that address permissible objects of regulation and does so rationally and consistently. The Commonwealth has outlawed tobacco sales to minors, an action of undisputed constitutionality. *See Austin v. Tennessee*, 179 U.S. 343 (1900). The

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plurality's proposed test to prevent such abuse. *See id.* ("a 'vice' label that is unaccompanied by a corresponding prohibition against the commercial behavior at issue fails to provide a principled justification for the regulation of commercial speech about that activity").

restriction of tobacco advertising is part of an overall program – indeed, part of a national program, including the FCLAA – dedicated to the same purpose as the outlawing of tobacco sales: the reduction of underage tobacco use. The Commonwealth has attempted numerous less speech-restrictive options, but was not and is not required to find the "least restrictive means" to accomplish its goal. *See Fox*, 492 U.S. at 481. The government's unequivocal message, part of a coherent and extensive regulatory scheme, is quite clear: underage tobacco use should be prevented. *See Packer*, 285 U.S. at 108-09 (Brandeis, J.) (upholding ban on billboard tobacco advertising as valid part of State's effort to "prevent the use of tobacco by minors").

Several additional factors support a determination that the regulations satisfy the fourth of *Central Hudson*'s requirements. First, with respect to the specific types of media at issue here, the Court has emphasized that "[e]ach method of communicating ideas is a law unto itself." *Metromedia*, 453 U.S. at 501 (billboards). The regulations therefore must be separately assessed as to each advertising medium: billboards, in-store advertisements, and self-service displays. If any of the restrictions at issue does not pass First Amendment muster, it may be severed from the remainder. *See* 940 Code Mass. Reg. § 21.06.

Second, Massachusetts' choice of a 1,000-foot radius in which to enforce its advertising restrictions permissibly applies not only to outdoor advertising, *see FDA v. Brown & Williamson*, 529 U.S. at 128, but also to advertisements within retail establishments selling tobacco products. This radius, and the area it encompasses, have received the Court's explicit approval in other First Amendment contexts. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 53 (1986) (approving use of 1,000-foot radius from, inter alia, schools and parks to bar adult

theaters from almost 95% of land area of town); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976) (plurality opinion) (government "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems").

Finally, the continued availability of a wide variety of alternative media for tobacco promotion undermines the tobacco companies' assertion that the regulations constitute a "total ban" on their commercial speech. Petitioners' argument that the regulations at issue unduly limit the advertising options available to small retailers, *see* Pet. Br. at 38, is unavailing. Petitioners are tobacco manufacturers, not retailers. They may not, in the context of a commercial speech case, make this sort of "overbreadth" argument. *See Flipside*, 455 U.S. at 497 ("the overbreadth doctrine does not apply to commercial speech"); *Fox*, 492 U.S. at 481 (same).

In the particular circumstances at issue, the fit between the regulations' ends and their means is a reasonable one. The restrictions therefore satisfy *Central Hudson*'s final prong.

B. Heightened Scrutiny Is Inappropriate In The Present Case

Petitioners argue that the Court should seize this case as an opportunity to apply a more stringent standard than that of *Central Hudson* to regulation of commercial speech. This argument ignores the context of the present case. Massachusetts' regulations seek to address problems unique to children, a particularly vulnerable class for whom the consequences of decisions they are ill-equipped to make can have lifelong repercussions. The regulations at issue were promulgated in furtherance of a State's laws outlawing tobacco sales to minors. In these particular circumstances, a State is entitled to greater, not

lesser, leeway to craft laws that restrict purely commercial speech.

Governmental restrictions on the constitutional rights of children are accorded "lesser scrutiny" than similar constraints on adults. *Carey*, 431 U.S. at 694 n.17. As a result, "the scope of permissible state regulation is broader as to minors than as to adults." *Id.* This regime rests on an uncontroversial assumption: "the law has generally regarded minors as having a lesser capability for making important decisions." *Id.* at 693 n.15 (citing *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 102 (1976) (Stevens, J., concurring in part and dissenting in part)).

Petitioners' call for heightened scrutiny of Massachusetts' tobacco regulations rests primarily on the concerns expressed by a number of Justices regarding the propriety of excepting certain types of commercial speech from enhanced review. But whatever the scope of these concerns, they certainly do not include the commercial speech at issue here. In *44 Liquormart*, a plurality of the Court observed that "[t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." 517 U.S. at 503; *see also id.* at 524 (Thomas, J., concurring). The *44 Liquormart* plurality also criticized "the offensive assumption that the public will respond 'irrationally' to the truth." *Id.* at 503. To seize on these statements as the basis for application of strict scrutiny for regulations aimed at protecting *children* makes no sense at all.

The problems associated with keeping rational, adult consumers ignorant of their choices in the marketplace have no bearing on the regulation of commercial speech addressed to children. *See Anheuser-Busch*, 101 F.3d at 329 (noting "the Supreme Court's repeated recognition that

children deserve special solicitude in the First Amendment balance because they lack the ability to assess and analyze fully the information presented through commercial media"). The same is true of concerns for maintaining a "fair bargaining process." *44 Liquormart*, 517 U.S. at 501. *See* Pet. Br. at 35. Children are, indeed, so removed from the world of commercial transactions that they lack even the capacity to enter into contracts: "Because he may not foresee the consequences of his decision, a minor may not make an enforceable bargain." *Planned Parenthood of Central Missouri*, 428 U.S. at 102 (Stevens, J.). It is precisely children's lack of capacity for foresight that motivates Massachusetts' attempt to intervene in its minor citizens' decisions regarding the use of tobacco products, decisions which carry with them lifelong consequences.[7]

Petitioners' curious reliance on the Court's statements regarding "paternalism" emphasizes the divergence of this case from the opinions expressing interest in heightened scrutiny for commercial speech with respect to adults. *See, e.g., 44 Liquormart*, 517 U.S. at 497 ("a State's paternalistic assumption that the public will use truthful, nonmisleading commercial information unwisely cannot justify a decision to suppress it"). A state may adopt protective measures to safeguard children that might be decried as unwarranted paternalism if applied only to adults. *See* Garner & Whitney, at 561 ("Paternalism in the service of children is a virtue, not a vice"). Indeed, Justice Scalia anticipated this difficulty with Petitioners' argument, noting that he shared the "aversion towards paternalistic governmental policies

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[7] The Court's only prior commercial speech cases dealing with asserted governmental interests in protecting children addressed the marketing of contraceptives, products about which *lack* of information might have such consequences. *See Bolger*, 463 U.S. at 60; *Carey*, 431 U.S. at 678.

that prevent *men and women* from hearing facts that might not be good for them." *44 Liquormart*, 517 U.S. at 517 (Scalia, J., concurring in part and concurring in the judgment) (emphasis added). The circumstance is far different, however, when children are exposed to a variety of commercial blandishments the accuracy of which they may be unable to discern. Children simply do not have the same capacity as adults for analyzing and weighing commercial messages. The government may therefore act to safeguard children, particularly when the product involved in the advertising has such a demonstrable potential for harm that its sale to children has been criminalized. This is all the more true with respect to media – like those at issue here – in which the commercial message is delivered outside the home, where parental influence and control are more attenuated.

Strict scrutiny is, therefore, peculiarly inappropriate in this particular case. There exist, moreover, serious concerns regarding the consequences of such stringent review for commercial speech in general. Basing constitutional doctrine on the real-life distinctions between commercial and noncommercial speech has permitted the Court to recognize protection for the former without debasing the core protection afforded the latter. *See Fox*, 492 U.S. at 481 ("To require a parity of constitutional protection for commercial and non-commercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech"). The Court's jurisprudence reflects, for example, that a false or misleading statement may be tolerated in the exposition of political or religious belief but is unacceptable in commercial advertising. *Compare Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940) *with Central Hudson*, 447 U.S. at 563. Likewise, no one can be compelled to speak another's political or religious

message, yet labeling and advertising disclosures may be required to protect and inform the public.[8] *Compare Pacific Gas and Electric Co. v. Public Util. Comm'n*, 475 U.S. 1, 16 (1986) ("the choice to speak includes within it the choice of what not to say") and *Wooley v. Maynard*, 430 U.S. 705, 714 (1977), *with 44 Liquormart*, 517 U.S. at 501 (contemplating mandatory disclosures of any "beneficial consumer information") and *In re R.M.J.*, 455 U.S. 191, 201 (1982). The application of strict scrutiny standards to commercial speech would result in challenges to reasonable governmental economic regulatory efforts to safeguard the public. Since many economic regulations have a speech-limiting or speech-compelling component, the application of strict scrutiny to assay government economic regulations under the guise of free speech analysis could be little different in effect from reviving the long-discredited strict scrutiny "liberty of contract" and substantive due process challenges leveled at economic regulation during the heyday of *Lochner v. New York*, 198 U.S. 45 (1905).[9] In any event, the question whether strict scrutiny should ever apply to commercial speech restrictions

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[8] *See Rubin*, 514 U.S. at 492 n.1 (Stevens, J., concurring in the judgment) (citing 21 U.S.C. § 343 (requiring contents and nutritional value of packaged foods be revealed on the label); 21 U.S.C. § 352 (setting disclosure requirements for drug labels); and 15 U.S.C. § 77e (mandating registration statement be filed before selling securities)).

[9] A tobacco industry challenge to the same federal cigarette labeling law on which Petitioners predicate their preemption case can easily be envisioned: tobacco companies have chronically denied that tobacco usage causes lung cancer and emphysema but are compelled to carry contrary warning labels that might be impermissible under a strict scrutiny standard. *See Wooley v. Maynard*, 430 U.S. 705, 715 (1977) (government could not compel citizens to "use their private property as a 'mobile billboard' for the State's ideological message").

need not be resolved here. The *present* case is simply not one in which heightened scrutiny is appropriate.

CONCLUSION

Amici States urge the Court to affirm the judgment of the Court of Appeals. The regulations at issue constitute a legitimate exercise of the State's traditional police powers to prevent illegal tobacco use by children. They are neither preempted by the FCLAA nor barred by the First Amendment.

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